United States District Court
Southern District of Texas
Victoria Division

STATE OF TEXAS, *et al.*,
Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*,
Defendants.

Case 6:23-cv-00007

PLAINTIFFS' MOTION FOR EXTRA-RECORD DISCOVERY

On March 22, 2023, the Court ordered the Parties to file any motions requesting extra-record discovery or evidence. ECF No. 90. Plaintiffs move the Court to approve discovery in this case.

SUMMARY OF THE ARGUMENT

Although the "record rule" generally precludes evidence outside the administrative record for claims under the Administrative Procedure Act (APA), that rule (1) does not apply to many of the issues for the Court's consideration at trial; and (2) even where the record rule does apply, it is subject to important exceptions that are applicable here. Plaintiffs request that the Court authorize the attached Plaintiffs' First Set of Discovery Requests (Exhibit A).

ARGUMENT

Parties are entitled to discovery of "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." The term "relevant" in Federal Rule of Civil Procedure 26 is "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Although "[i]nformation within this scope of discovery need

not be admissible in evidence to be discoverable," Fed. R. Civ. P. 26(b)(1), as explained below, information subject to discovery on various issues is admissible evidence at trial and not precluded by the record rule. Discovery on these matters is therefore proper despite the general rule that claims under the APA are limited to review of the administrative record.

In an APA action, the "whole record" standard for review, 5 U.S.C. § 706, requires the court to conduct a "thorough, probing, in-depth review." *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 415 (1971); *see also id.* at 413-14 n.30, 419. Discovery is necessary for the Court to be presented with the relevant evidence it needs at trial.

I. The record rule does not limit the evidence available to resolve many questions.

The record rule does not govern issues like standing or other jurisdictional issues, or the non-merits factors for injunctive relief. *See Pub. Power Council v. Johnson*, 674 F.2d 791, 793 (9th Cir. 1982) (Kennedy, J.) ("even when judicial review is confined to the record of the agency, as in reviewing informal agency actions, there may be circumstances to justify expanding the record or permitting discovery").

A. The record rule does not apply to jurisdictional issues.

The record rule does not apply to non-merits issues like subject matter jurisdiction, including standing and whether there is final agency action. Evidence about such issues does not implicate the record rule because courts consider it "not in order to supplement the administrative record on the merits, but rather to determine [their own] jurisdiction." *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 528 (9th Cir. 1997); *see also Sierra Club v. Yeutter*, 911 F.2d 1405, 1421 (10th Cir. 1990). Courts routinely rely on extra-record evidence to support jurisdiction in APA cases, including for Article III standing. *See, e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153–54 (2010) (relying on declarations to find that plaintiffs

had Article III standing in an APA case); *Texas v. United States*, 40 F.4th 205, 216–18 (5th Cir. 2022) (same); *Texas v. Biden*, 10 F.4th 538, 547 (5th Cir. 2021) (same); *Theodore Roosevelt Conservation Pship. v. Salazar*, 616 F.3d 497, 507 (D.C. Cir. 2010) (same); *Texas v. Biden*, No. 2:21-CV-067-Z, 2021 WL 4552547, at *3 (N.D. Tex. July 19, 2021) (Kacsmaryk, J.) (same).

The proposed Discovery Requests seek information relevant to Article III standing, such as injuries to the Plaintiffs from criminal activity (RFP No. 5, RFA No. 3), public education costs (RFP No. 7; ROG No. 4; RFA No. 1), health care costs (RFA Nos. 2, 5), or driver's license costs (RFA No. 4), and the extent of those costs (RFP Nos. 8, 13; ROG Nos. 1–15; RFA Nos. 5–7, 11)

Courts also permit discovery to plaintiffs to obtain such evidence relevant to the question of whether there is a final agency action under the APA. [1] *See, e.g., Glenwood Springs Citizens' All. v. U.S. Dept. of Interior*, Civil Action No. 20-cv-00658, 2021 WL 916002, at *1–2 (D. Colo. Mar. 10, 2021) (ordering limited discovery in an APA case regarding "whether Defendants engaged in any action that would be subject to review under the APA"); *Doe 1 v. Nielsen*, No. 18-cv-02349, 2018 WL 4266870, at *1–3 (N.D. Cal. Sept. 7, 2018) (permitting limited jurisdictional discovery in an APA case where "discovery of the nature of the agency action issue is necessary in order for the parties and the Court to determine the scope of the administrative record to be produced"); *Grand Canyon Tr. v. Williams*, No. 3:13-cv-8045, 2013 WL 12176992, at *1 (D. Ariz. Sept. 9, 2013) (permitting written discovery for plaintiffs to develop facts to demonstrate final agency action). This analysis of agency finality includes whether the action is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). This analysis is similar to that of whether the agency action is subject to

[1] *See Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir. 2011) ("if there is no final agency action, a federal court lacks subject matter jurisdiction").

notice-and-comment rulemaking or is instead an exempted policy statement. *Texas v. United States*, 606 F. Supp. 3d 437, 493 (S.D. Tex.) (Tipton, J.), *cert. granted before judgment,* 213 L. Ed. 2d 1138 (July 21, 2022).

Any other rule would make it practically impossible to challenge unlawful agency action. An administrative record certified by a federal agency will rarely include evidence of the injury to any particular potential plaintiff or whether a final agency action has occurred. *See Nw. Envtl. Def. Ctr.*, 117 F.3d at 1527–28 ("Article III's standing requirement does not apply to agency proceedings," so there is "no reason to include facts sufficient to establish standing as a part of the administrative record. Only when a plaintiff "later seeks judicial review, [does] the constitutional requirement that it have standing kick[] in."). Plaintiffs are entitled to seek discovery in this case that would support allegations of how the challenged agency actions inflict injuries on them, and how they constitute challengeable final agency action.

B. The record rule does not apply to remedial questions.

The record rule also does not limit the evidence this Court can consider when determining the propriety and scope of injunctive or other relief at trial. "[I]n cases where relief is at issue, especially at the preliminary injunction stage," courts may consider extra-record evidence. *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989).[2] *See also Davis Mountains Trans-Pecos Heritage Assn. v. FAA*, 116 Fed. Appx. 3, 16 (5th Cir. 2004) (stating that this "correctly state[s] the law"); *accord Natl. Fedn. of Indep. Bus. v. Perez*, No. 5:16-cv-66, 2016 WL 3766121, at *23 (N.D. Tex. June 27, 2016).

[2] At trial, the Court will consider whether a permanent injunction should issue, and the considerations are the same as for issuing a preliminary injunction "with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success" at the preliminary stage. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987).

The APA thus permits courts to assess "the balance of the equities and the public interest" for injunctive relief using extra-record evidence. *E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1106–08 (N.D. Cal. 2018), *aff'd*, 950 F.3d 1242 (9th Cir. 2020); *accord Biden*, 2021 WL 4552547, at *3. There would be no other way to do so, as "injunctive relief is generally not raised in the administrative proceedings below and, consequently, there usually will be no administrative record developed on these issues." *Eco Tour Adventures, Inc. v. Zinke*, 249 F. Supp. 3d 360, 369 n.7 (D.D.C. 2017) (quotation omitted). "Thus, it will often be necessary for a court to take new evidence to fully evaluate claims of irreparable harm and claims that the issuance of the injunction is in the public interest." *Id.* (quotation omitted).

The Discovery Requests seek information relevant to the proper geographic scope of relief (RFA No.11), as well as irreparable injuries and the balance of harms (RFP Nos. 2, 4–5, 7; ROG Nos. 1–15; RFA Nos. 2–7).

C. The record rule does not apply to some of the States' claims.

The States assert a claim of *ultra vires* agency action. ECF 20 at 31 (Count Two). Such claims are "at equity" and not limited by the APA's record rule. *see also* 33 Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 8304 (2d ed.) (describing "nonstatutory review of agency action" that does not depend on the APA).

In a recent immigration case where Texas made similar claims against the Biden Administration's rescission of the Migrant Protection Protocols (MPP) program, Judge Kacsmaryk denied a motion to strike Texas's evidence as outside the record—such claims can be raised outside the APA through a cause of action "at equity" and are therefore not limited by the record rule. *Biden*, 2021 WL 4552547, at *4–6. The same reasoning applies here.

The Discovery Requests seek information relevant to this claim that the challenged agency actions exceed statutory authority to grant parole and substitute

for the congressionally authorized channels of immigration and are therefore *ultra vires* (RFP Nos. 1–4, 9–11; ROG Nos. 1–2, 8–9, 15; RFA Nos. 5, 8–10, 12).

II. The record rule is narrow when evaluating agency decisionmaking.

Even where the record rule applies, it "is not without exceptions." *Euzebio v. McDonough*,989 F.3d 1305, 1322 (Fed. Cir. 2021). The exceptions are applied in light of "[t]he record rule's purpose": "to guard against courts using new evidence to convert the arbitrary and capricious standard into effectively de novo review—not to preclude effective judicial review entirely." *Id.* (cleaned up). Thus, "in certain circumstances a court may permit supplementation of the record or the introduction of extra-record evidence to enable effective judicial review." *Gulf Coast Rod Reel & Gun Club, Inc. v. U.S. Army Corps of Engrs.*, No. 3:13-cv-126, 2015 WL 1883522, at *1 (S.D. Tex. Apr. 20, 2015).

The Fifth Circuit has identified three circumstances in which consideration of extra-record evidence is appropriate:

1. the agency deliberately or negligently excluded documents that may have been adverse to its decision,

2. the district court needed to supplement the record with "background information" in order to determine whether the agency considered all of the relevant factors, or

3. the agency failed to explain administrative action so as to frustrate judicial review.

Medina Cnty. Envtl. Action Assn. v. Surface Transp. Bd., 602 F.3d 687, 706 (5th Cir. 2010) (alteration omitted). But this list is not exhaustive and "did not explicitly purport to overrule prior decisions concerning exceptions." *Gulf Coast*, 2015 WL 1883522, at *3; *see also Biden*, 2021 WL 4552547, at *2 ("[*Medina* was not] a sea change in this circuit's law on extra-record evidence.") (quoting *Gulf Coast*, 2015 WL 1883522, at *4). Courts have also recognized a more detailed list of "eight exceptions":

1. when agency action is not adequately explained in the record before the court;

2. when the agency failed to consider factors which are relevant to its final decision;

3. when an agency considered evidence which it failed to include in the record;

4. when a case is so complex that a court needs more evidence to enable it to understand the issues clearly;

5. in cases where evidence arising after the agency action shows whether the decision was correct or not;

6. in cases where agencies are sued for a failure to take action;

7. in cases arising under NEPA; and

8. in cases where relief is at issue, especially at the preliminary injunction stage.

Id. at *2 (footnote omitted); *accord NFIB v. Perez*, 2016 WL 3766121 at *23.

Most importantly here, courts allow extra-record evidence when it is necessary to determine whether the agency "considered all the relevant factors." *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981). "[A]n adequate record can sometimes only be determined 'by looking outside the [administrative record] to see what the agency may have ignored.'" *Davis Mtns.*, 249 F. Supp. 2d at 776 (quoting *Cnty. of Suffolk v. Secy. of Interior*, 562 F.2d 1368, 1384 (2d Cir. 1977)); *see also Davis Mtns.*, 116 Fed. Appx. at 15–16 (district court abused its discretion by excluding extra-record evidence "necessary to determine" whether agency "took a hard look" at a factor).

"[I]t will often be impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not." *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160

(9th Cir. 1980). Consideration of extra-record evidence is also permitted "when supplementing the record is necessary to explain technical terms or complex subject matter." *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) (quotations omitted).

Thus, courts may supplement the administrative record with "affidavits, depositions, or other proof of an explanatory nature" if necessary to "explain the record and [] determine the adequacy of the procedures followed and the facts considered" by the agency. *Arkla Expl. Co. v. Tex. Oil & Gas Corp.*, 734 F.2d 347, 357 (8th Cir. 1984); *see also, e.g., Sierra Club v. Marsh*, 976 F.2d 763, 772 (1st Cir. 1992); *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1428 (6th Cir. 1991). In other words, such evidence is admissible "to educate the court and to illuminate the administrative record, not to substitute the court's judgment for the [agency's]." *Arkla*, 734 F.2d at 357; *see also San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 993 (9th Cir. 2014). That extra-record evidence is particularly appropriate in cases not involving formal adjudications or notice-and-comment rulemaking where Plaintiffs lacked an "opportunity to submit such evidence" into the administrative record—cases such as this one. *Oceana, Inc. v. Pritzker*, 126 F. Supp. 3d 110, 113–14 (D.D.C. 2015).

This approach makes sense. One of the key issues for trial is whether Defendants ignored critical factors in the challenged memoranda. *See* ECF 20 at 30; ECF 22 at 22–24 (failure to consider various factors, including limitations on parole authority that require benefit from paroling each individual alien rather than accumulated benefits of paroling masses of aliens). Precluding discovery on this issue would "preclude effective judicial review entirely" by keeping hidden evidence of the information they ignored precisely because they ignored it. *Euzebio*, 989 F.3d at 1322 (cleaned up).

Evidence is also relevant "to enable effective judicial review … when agency action is not adequately explained in the record before the court and [because the] case is so complex that a court needs more evidence to enable it to understand the issues clearly." *Gulf Coast*, 2015 WL 1883522, at *2. For example, a key issue in determining whether the challenged agency actions were subject to the requirements of notice-and-comment rulemaking is whether they are legislative rules rather than excepted policy statements; other issues for this claim are whether the actions were exempt because of the foreign-affairs exception, ECF 22 at 19–20, or the good-cause exception, ECF 22 at 21.

The Court has previously allowed extra-record evidence to support a notice-and-comment claim:

> First, the Fifth Circuit's tests for determining whether an agency rule is covered by the APA's exceptions to the notice and comment requirements make evaluation of the rule's *effects* necessary. *See Texas DAPA*, 809 F. 3d at 171 (explaining that whether a rule is a general statement of policy turns on whether it "has binding effect"); *id.* at 176 (whether a rule is procedural turns on whether it has a "substantial impact"). Thus, the rule against extra-record evidence cannot apply. Alternatively, the third *Medina* exception allows for consideration of extra-record evidence when "the agency failed to explain administrative action so as to frustrate judicial review." *Medina Cnty.*, 602 F.3d at 706. Because consideration of the effects of the Final Memorandum is necessary to determine whether the Final Memorandum is a general statement of policy or a procedural rule, *see Texas DAPA*, 809 F.3d at 171–76, excluding that evidence would "frustrate judicial review"; thus, it is admissible under the third *Medina* exception. *See Medina Cnty.*, 602 F.3d at 706.

Texas, 606 F. Supp. 3d at 493 n.66. Extra-record evidence of how the challenged program was implemented or enforced was proper in considering whether it was an exempt policy statement because of the need to determine if the program (1) imposed

any rights or obligations, or (2) genuinely left the agency and its decisionmakers free to exercise discretion. *Id.* at 493–94.

Thus, the Court can consider extra-record evidence concerning Defendants' application of the challenged programs even though that evidence is not in the administrative record. The Discovery Requests seek information relevant to how the challenged agency actions have been implemented to show whether they are applied in a way that makes them binding or imposes any rights or obligations (RFP Nos. 1–4, 9–11; ROG Nos. 1–3, 5–7, 9, 13–15; RFA Nos. 7–10, 12), and whether they fall within the foreign-affairs and good-cause exceptions (RFP Nos. 12–13; ROG Nos. 9–12; RFA No. 6).

CONCLUSION

Plaintiffs respectfully request that the Court allow the extra-record discovery attached as Exhibit A.

Dated March 24, 2023.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

I certify that the total of words in this motion, exclusive of the matters designated for omission, is 2,903, as counted by Microsoft Word.

/s/Ryan D. Walters

CERTIFICATE OF CONFERENCE

I certify that on March 24, 2023, I conferred with counsel for Defendants, who represented that Defendants are opposed to this motion.

/s/Ryan D. Walters

CERTIFICATE OF SERVICE

I certify that on March 24, 2023, this motion was filed through the Court's CM/ECF system, which automatically serves it upon all counsel of record.

/s/Ryan D. Walters